SFO Good-Nite Inn, LLC *and* Unite Here! Local 2.
Case 20–CA–32754

March 20, 2008

DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On September 28, 2006, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision, limited cross-exceptions and a supporting brief, and an answering brief to the Respondent's exceptions. The Respondent filed an answering brief to the General Counsel's limited cross-exceptions and a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt his recommended Order as modified and set forth in full below.[2]

We agree with the judge, for the reasons stated in his decision, that the Respondent violated Section 8(a)(1) by soliciting employees Christina Valencia and Maria Maldonado to sign a union disaffection petition and by accompanying that solicitation with a promise of benefits.[3] For the reasons set forth below, we also affirm the judge's findings that the Respondent discriminatorily selected Maldonado and Valencia for discharge in violation of Section 8(a)(3) and unlawfully withdrew recognition of the Union in violation of Section 8(a)(5).[4]

I. BACKGROUND

The Respondent owns and operates a hotel located near the San Francisco International Airport. The Union was party to a collective-bargaining agreement with the Respondent's predecessor, Wyndham International, effective December 5, 1999, through November 30, 2003, and extended by agreement through November 2004. The Respondent purchased the hotel in March 2004 and assumed the collective-bargaining agreement, which included a union-security clause. In August 2004, the Union gave notice of its intent to modify the agreement; the parties agreed that it would remain in effect during bargaining. The parties met and bargained on three dates in 2005 without concluding a successor agreement.[5] On August 23, the Union demanded that several housekeepers, including Valencia and Maldonado, be discharged unless they met their union-security obligations.

On August 31, Valencia and Maldonado were called to a meeting with General Manager Chaudhry. Banquet Manager Naomi Grace Vargas also attended and served as an interpreter. Chaudhry informed the employees that they owed the Union $400 in dues and that the Union would have them fired if they did not pay the amount

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] There are no exceptions to the judge's findings that the Respondent additionally violated Sec. 8(a)(1) by threatening employee Margarita Taloma with a reduction in hours if employees remained unionized and promising her benefits if she would sign a disaffection petition, by threatening to withhold approval of employee Luz Verdin's vacation request and promising to approve the request if Verdin signed the petition, and by threatening employee Consuelo Contreras with discharge for telling employees not to sign the petition.

The judge inadvertently omitted conclusions of law related to his findings that the Respondent unlawfully solicited Valencia and Maldonado to sign a disaffection petition and unlawfully threatened Contreras with discharge. We will amend the judge's Conclusions of Law and modify the Order accordingly. We will also substitute a new notice in conformity with the Order as modified and in accordance with *Ishikawa Gasket America*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

The General Counsel excepts to the judge's failure to find that the Respondent interrogated employees Valencia and Maldonado in violation of Sec. 8(a)(1) when General Manager A.C. Chaudhry said to them that he did not know why they wanted the Union and that Respondent would give the employees paid vacation and Kaiser health benefits. Although a statement does not necessarily have to be in the form of a question to constitute an unlawful interrogation, see *Children's Services International,* 347 NLRB No. 7, slip op. at 13–14 (2006), such a statement cannot be an interrogation if it does not call for an answer, *Valley Community Services*, 314 NLRB 903, 911 (1994). Viewed in context, Chaudhry's statement that he did not know why the employees wanted the Union did not call for an answer but rather served as a lead-in to the unlawful promise of benefits that immediately followed. Thus, we are unpersuaded by the General Counsel's exception.

[4] The Respondent excepted generally to the judge's recommended Order "in its entirety," but it did not except specifically to the judge's grant of an affirmative bargaining order to remedy the Respondent's unlawful withdrawal of recognition. We therefore find it unnecessary to address whether a specific justification for that remedy is warranted. *SKC Electric, Inc.*, 350 NLRB No. 70, slip op. at 6 fn. 15 (2007); *Heritage Container, Inc*., 334 NLRB 455, 455 fn. 4 (2001); see also *Highlands Hospital Corp. v. NLRB*, 508 F.3d 28, 32–33 (D.C. Cir. 2007) (holding exception to a remedial order "in its entirety" too broad to preserve court challenge to an affirmative bargaining order).

[5] All dates hereafter are in 2005, unless stated otherwise.

due. He also said that the Union was no good and that it was costing the Respondent a lot of money. Chaudhry then told the employees that they could sign a petition to "deunionize" the hotel. Chaudhry told them to have lunch and that they could come back later and sign "the paper." The employees did not return after lunch and did not sign the petition. Later that afternoon, Vargas approached Valencia and asked if she was going to sign "the paper" and why the employees did not want to "deunionize."[6]

In late August, Assistant Manager Leah Aquino asked housekeeper Taloma to sign an antiunion petition. Aquino said that Taloma's situation might not be as good if the hotel remained unionized, that the Union might let Taloma work only part time, and that she (Aquino) could help only if Taloma signed the petition. Subsequently, Aquino visited Taloma at her home and again asked her to sign the petition. Taloma did not sign.

On September 6, room inspectress and union negotiating committee member Consuelo Contreras urged housekeeper Xian Tan not to sign the antiunion petition. Later that day, Chaudhry and Eric Yokeno, one of the Respondent's owners, asked Contreras why she was telling employees not to sign the petition and told her that she could be fired for doing so on worktime. Chaudhry admitted that Contreras' discussions with other employees did not violate any valid no-solicitation rule.

The Respondent's occupancy rate typically decreases each year after mid-August, and it did so again after mid-August 2005. The judge found, and no one disputes, that because of the seasonal slowdown, the Respondent had a legitimate business reason to lay off housekeepers in September 2005. In prior years, Chaudhry laid off employees in the slow season and recalled them when business picked up.

Chaudhry and Aquino testified that on September 6, Chaudhry told Contreras that he had to let two housekeepers go and that Contreras named Maldonado and Valencia when asked which two she would recommend for termination based on performance. Contreras, whose testimony the judge credited, denied this and further testified that Maldonado and Valencia performed their work well. On September 7, Chaudhry discharged Valencia and Maldonado.

On September 14, the Respondent notified the Union that it was withdrawing recognition based on employee petitions stating that a majority of employees no longer wished to be represented by the Union.

On October 4, employee Verdin asked Aquino about a vacation request that Verdin had submitted in August. Aquino replied by asking Verdin to sign the petition to remove the Union. After adding that most of the employees had already signed the petition, Aquino told Verdin that if Verdin would sign the antiunion petition, Aquino would sign Verdin's vacation request. Verdin subsequently signed the petition and Aquino signed the vacation request, backdating it to September 14.

[6] Vargas' question was not alleged to violate the Act.

II. DISCHARGE OF VALENCIA AND MALDONADO

As stated above, the judge found that the Respondent had a legitimate reason to reduce staff in September as the hotel's busy season came to an end. To reduce labor costs during the annual seasonal slowdown, the Respondent in past years had instituted layoffs. Later, when business picked up again, the laid-off workers would be recalled. In 2005, the Respondent departed from this practice by discharging the two housekeepers instead of laying them off. Finding that the Respondent selected Valencia and Maldonado for discharge because they did not sign the antiunion petition, the judge concluded that the discharges violated Section 8(a)(3). We agree.

Under *Wright Line*,[7] the General Counsel must first show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes that showing by demonstrating protected activity, employer knowledge of that activity, and animus against protected activity, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. *United Rentals*, 350 NLRB No. 76, slip op. at 1 (2007) (citing *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004)). If, however, the evidence establishes that the reasons given for the employer's action are pretextual—that is, either false or not in fact relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis. Id., slip op. at 1–2 (citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)).

The General Counsel met his initial burden under *Wright Line*. Maldonado and Valencia engaged in protected activity by refusing to sign the antiunion petition. The Respondent's knowledge of that activity is established by the failure of the two to return after lunch and sign the petition as Chaudhry had requested, and by Vargas' asking Valencia that same afternoon if she was go-

[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

ing to sign "the paper" and why she and Maldonado did not want to "deunionize." Thus, like the judge, we infer that the Respondent was well aware of the employees' refusal to sign the petition. The Respondent's substantial animus against such protected activity is demonstrated by the unlawful threats and/or promises it directed at employees Valencia, Maldonado, Taloma, Contreras, and Verdin based on their responses to its unlawful solicitations of support for the petition. The timing of the discharges only 1 week after the two employees' protected refusal to sign the petition further supports the finding that the discharges were unlawfully motivated. See, e.g., *Progressive Electric, Inc. v. NLRB*, 453 F.3d 538, 549 (D.C. Cir. 2006) (antiunion motivation established by knowledge, antiunion hostility, and timing of employer's actions); *Real Foods Co.*, 350 NLRB No. 32, slip op. at 4–5 (2007).

The Respondent contends that it discharged Valencia and Maldonado because they were the probationary employees whom Contreras selected as being the least qualified. The credited testimony of Contreras, however, establishes that she never recommended Valencia and Maldonado for discharge and never told Chaudhry that they had performance problems. Because the Respondent's only proffered reason for the discharges was found to be pretextual, the Respondent necessarily failed to show that it would have discharged the employees even in the absence of their protected conduct; and the *Wright Line* analysis ends there. *United Rentals*, supra, slip op. at 1–2.

III. THE WITHDRAWAL OF RECOGNITION

The judge concluded that the Respondent violated Section 8(a)(5) by withdrawing recognition of the Union on September 14. For the following reasons, we agree with the judge's conclusion.

As detailed above, the Respondent engaged in conduct that directly tainted the disaffection petition upon which it relies to demonstrate the Union's loss of majority status. The Respondent solicited employees to sign the petition and directed threats and promises towards employees to coerce them to support the petition, all in violation of Section 8(a)(1). The Respondent's conduct went far beyond the "ministerial aid" of a petition permitted by the Act. See, e.g., *Mickey's Linen & Towel Supply*, 349 NLRB No. 76, slip op. at 2 (2007). The General Counsel contends that, because of this misconduct, the petition could not provide a valid basis for the Respondent's withdrawal of recognition. We find merit in the General Counsel's contention.

When an employer withdraws recognition from an incumbent majority representative, it violates Section 8(a)(5) unless it meets its burden to show that the union has actually lost its majority status. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). Decertification petitions of the type signed by the employees here will generally be sufficient to meet that burden, absent countervailing evidence. *Hearst Corp.,* 281 NLRB 764 (1986), affd. mem. 837 F.2d 1088 (5th Cir. 1988); see also *Levitz,* supra at 725 fn. 49.

Where an employer has engaged in conduct designed to undermine employee support for the union, however, the decertification petitions will be found to have been tainted by the unfair labor practices and the employer will be precluded from relying on those petitions as a basis for withdrawing recognition. *Hearst Corp.,* supra; see also *Texaco Inc.,* 264 NLRB 1132, 1132–1133 (1982), enfd. 722 F.2d 1226 (5th Cir. 1984) (antiunion petition invalid where the employer unlawfully assisted in its circulation and encouraged employees to sign); *Tyson Foods*, 311 NLRB 552, 556 (1993) ("Where an employer aids or supports employees in withdrawing from a union or otherwise manifesting their disaffection with an incumbent representative, the Board has held that the evidence of withdrawal or disaffection thus procured by the employer cannot serve as the requisite objective basis upon which a lawful withdrawal of recognition must be predicated."); *American Linen Supply Co*., 297 NLRB 137, 137–138 (1989), enfd. 945 F.2d 1428 (1991) (same).

Here, as in the cases cited above, the Respondent unlawfully assisted an antiunion petition. General Manager Chaudhry solicited employees Valencia and Maldonado to sign the petition; Assistant Manager Aquino encouraged employee Taloma to sign, accompanied by threats and promises; and Chaudhry and coowner Yokeno threatened employee Contreras with discharge for opposing the petition. The Respondent is precluded from relying on the petition, tainted by these unfair labor practices, as a basis for withdrawing recognition from the Union. *Hearst Corp.,* supra; *Texaco Inc.,* supra; *Tyson Foods*, supra; *American Linen Supply Co*., supra.

The Respondent contends that the petition was not tainted by its unfair labor practices because there is no evidence that the employees who signed it knew of the unlawful conduct.[8] But the Board specifically rejected this contention in *Hearst Corp.,* supra. There, 17 of 33 petition signers affirmatively testified that they were unaware of the employer's unlawful conduct. This evi-

[8] None of the employees found to have been unlawfully coerced to sign the petition did so, with the exception of Verdin, who signed the petition *after* the withdrawal of recognition. The record does not show whether or not the remaining petition signers knew of the unfair labor practices.

dence was insufficient to meet the employer's "burden of showing that the petition was untainted," however, because the unfair labor practices were "aimed specifically at causing employee disaffection with their union" and included suggesting to employees that they sign the petitions and urging employees to persuade their coworkers to withdraw their support for the union. 281 NLRB at 764–765. Unfair labor practices of this character, which are also present here, will taint a decertification petition "notwithstanding that some employees may profess ignorance of their employer's misconduct." Id. at 765.[9] A fortiori, the absence in this case of affirmative evidence that the petition signers were aware of the unfair labor practices is insufficient to meet Respondent's burden of showing that the petition was untainted.[10]

For these reasons, we affirm the judge's conclusion that the withdrawal of recognition violated Section 8(a)(5).[11]

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By soliciting employees to sign a union disaffection petition, the Respondent violated Section 8(a)(1) of the Act.

4. By threatening employees with discharge or loss of benefits, and by promising benefits, in order to coerce employees to sign a union disaffection petition, the Respondent violated Section 8(a)(1) of the Act.

5. By discharging employees Maria Maldonado and Christina Valencia in order to discourage union activities and union membership, the Respondent violated Section 8(a)(3) and (1) of the Act.

6. By withdrawing recognition from and refusing to bargain with the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

7. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, SFO Good-Nite Inn, LLC, South San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employees to sign a union disaffection petition.

(b) Threatening employees with discharge or loss of benefits, and promising benefits, in order to coerce employees to sign a union disaffection petition.

(c) Discharging employees in order to discourage union activities and union membership.

(d) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of Respondent's employees in the unit described below.

(e) Refusing to meet and bargain with the Union as the exclusive collective-bargaining representative of Respondent's employees in the unit described below with respect to rates of pay, hours of employment, and other terms and conditions of employment including union security, wages, and contributions to health insurance.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement:

> All employees covered by the collective-bargaining agreement between Respondent and the Union that was effective by its terms through November 30, 2003, and extended by agreement through November 2004.

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[9] As the Board explained in *Hearst,* supra at 765 (fn. omitted):

> [A]n employer who engages in efforts to have its employees repudiate their union must be held responsible for the foreseeable consequences of its conduct. Here, the Respondent, by engaging in conduct purposefully designed to cause employee disaffection with Local #25, began a chain of events that culminated in the foreseeable repudiation of that union. In these circumstances, we are unwilling to allow the Respondent to enjoy the fruits of its violations by asserting that certain of its employees did not know of its unlawful behavior, but rather shall hold it responsible for the predictable consequences of its misconduct. . . .

[10] Member Schaumber acknowledges that *Hearst Corp.* is extant Board law and applies it for the purpose of deciding this case. In his view, even unfair labor practices such as those in this case might not taint a petition if there was affirmative evidence that a majority of unit employees both signed the petition and were unaffected by the unlawful conduct. As noted above, however, there was no such showing in this case.

[11] We therefore find it unnecessary to pass on the judge's finding that the petition was tainted under the standards set forth in *Master Slack Corp.*, 271 NLRB 78, 84 (1984), or his finding that the collective-bargaining agreement was a bar to the Respondent's withdrawal of recognition. See generally *Shaw's Supermarkets, Inc.,* 350 NLRB No. 55 (2007).

Member Liebman, who dissented in *Shaw's Supermarkets*, agrees that it is unnecessary to address the issues presented there for the purpose of deciding this case.

(b) Within 14 days from the date of this Order, offer Maria Maldonado and Christina Valencia full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Maria Maldonado and Christina Valencia whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Maria Maldonado and Christina Valencia, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in South San Francisco, California, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2005.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 20, 2008

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT solicit you to sign an antiunion petition.

WE WILL NOT threaten you with discharge or loss of benefits, or promise you benefits, in order to coerce you to sign an antiunion petition.

WE WILL NOT discharge any of you in order to discourage union activities and union membership.

WE WILL NOT withdraw recognition from Unite Here! Local 2 as the exclusive collective-bargaining representative of our employees in the unit described below.

WE WILL NOT refuse to meet and bargain with the Union as the exclusive collective-bargaining representative of our employees in the unit described below with respect to rates of pay, hours of employment, and other terms and conditions of employment including union security, wages, and contributions to health insurance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, upon request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an under-

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

standing is reached, embody such understanding in a signed agreement:

> All employees covered by the collective-bargaining agreement between Respondent and the Union that was effective by its terms through November 30, 2003, and extended by agreement through November 2004.

WE WILL, within 14 days from the date of the Board's Order, offer Maria Maldonado and Christina Valencia full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Maria Maldonado and Christina Valencia whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Maria Maldonado and Christina Valencia, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

SFO GOOD-NITE INN, LLC

John Ontiveros, Esq. and *Micah Berul, Esq.,* for the General Counsel.
Patrick Jordan, Esq. (Jordan Law Group), of San Rafael, California, for Respondent.
Matthew Ross, Esq. and *Danielle Lucido, Esq. (Leonard, Carder*), of Oakland, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at San Francisco, California, on April 18 through 20, May 23, and on June 13, 2006, in San Mateo, California. On October 14, 2005, Unite Here! Local 2 (the Union) filed the original charge alleging that SFO Good-Nite Inn, LLC (Respondent) committed certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Union filed the first amended charge on November 22 and a second amended charge on December 15, 2005. On March 1, 2006, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(1), and (5) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing. The General Counsel amended the complaint at hearing on April 18 and 19, and June 13, 2006.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses and having considered the posthearing briefs of the parties, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent admits facts establishing that it meets the Board's jurisdictional standards and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent, a California corporation, is the owner and operator of a hotel located near the San Francisco International Airport in South San Francisco. The Union was the exclusive collective-bargaining representative of the housekeeping and maintenance employees of the hotel when Respondent purchased the hotel from Wyndham International in March 2004. Wyndham and the Union were party to a collective-bargaining agreement effective by its terms from December 5, 1999 through November 30, 2003. The Union and Wyndham agreed to a 1-year extension of the collective-bargaining agreement through November 2004. When it purchased the hotel in March 2004, Respondent assumed the collective-bargaining agreement then in effect between the Union and Wyndham International. The bargaining agreement contained the following provision at issue herein:

> Section. TERM OF AGREEMENT
>
> This Agreement shall be in effect for the period commencing December 5, 1999 and continuing to and including November 30, 2003. At least (90) days prior to November 30, 2003 either party may serve notice upon the other by Certified Mail, of a desire to terminate, change or modify this Agreement, or any part thereof. In the event no such notice is given, this Agreement shall be renewed from year to year after the expiration date hereof, subject to written notice of termination or modification ninety (90) days prior to any subsequent anniversary date of this Agreement. For the purpose hereof, December first (1st) of each year, commencing December 5, 1999 shall be deemed the anniversary of this Agreement. If, prior to the expiration date, following the submission of such notice, unless time is mutually extended, the parties fail to reach an Agreement, then either party shall be free to strike or lock out.
>
> Upon receipt of such notice, it is agreed by both parties that negotiations will commence within fifteen (15) days. In the event a new wage settlement is not agreed upon by November 30, 2003 this Agreement shall continue beyond

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

the expiration date thereof for such period of time as parties are engaged in negotiating such successor Agreement.

The complaint alleges that Respondent unlawfully threatened employees with a reduction in hours, threatened to withhold approval of a vacation request, promised benefits, interrogated employees, solicited employees to sign an antiunion petition, and threatened employees with termination for opposing an antiunion petition. The complaint further alleges that Respondent terminated the employment of two housekeeping employees because they refused to sign an antiunion petition. Finally, the complaint alleges that Respondent unlawfully withdrew recognition from the Union during the term of the contract. The General Counsel also alleges that withdrawal of recognition was "unlawful because it relied on a tainted employee petition as the putative evidence of loss of majority support."

Respondent denies the commission of any unfair labor practices. In addition, Respondent contends that the two employees were discharged based on a slowdown in business. Respondent contends that it lawfully withdrew recognition from the Union based on a petition from a majority of the bargaining unit employees stating that they no longer wished to be represented by the Union. Finally, Respondent contends that the agreement lawfully expired upon Respondent's withdrawal of recognition.

On August 3, 2004, the Union sent notice of its intent to change, alter and modify the agreement. Harry Young, union field representative and Patrick Jordan, Respondent's attorney agreed that the agreement would remain in effect during bargaining. The parties first met for negotiations on March 11, 2005. Additional negotiation meetings were held on August 23 and September 7, 2005. At the March 11 bargaining session, the Union presented a contract proposal. The parties discussed the fact that Respondent was experiencing financial difficulties and was in arrears to the health and welfare trust fund.

At the August 23 meeting, the parties discussed the fact that Respondent was in arrears in making its trust fund contributions. The Union presented Respondent with a written demand that five new housekeepers be discharged unless they met their union-security obligations by Friday, August 26.[2] The Union also presented Respondent with an application for membership in the Union which employees could sign. Jordan asked if Young had cleared this request with the Union's attorneys and Young answered that he had done so. Jordan then directed that copies of the Union's request be made.

On the next day, August 24, Jordan wrote Young agreeing to inform the employees of their union-security obligations and requesting additional time for the employees to meet their dues obligations. On August 31, 2005, Afzal "A.C." Chaudhry (A.C.), Respondent's general manager, and Naomi Grace Vargas, banquet manager, met with employees to read a memo describing the union dues obligations. Vargas, fluent in English and Spanish, was present because she acted as an interpreter. The employees were told that Respondent had a labor contract with the Union which required that employees who have worked over 31 days had to pay fees and dues to the Union. A.C. explained that the employees could join the Union and become union members or could pay dues and fees without joining the Union.

Christina Valencia testified that she and Maria Maldonaldo, also a housekeeper, were called into a meeting with A.C. and Vargas.[3] Vargas acted as interpreter for A.C. According to Valencia, A.C. said that the employees owed the Union $400 and that amount had to be paid by September 26. If the employees did not pay the amount due, the Union would have them fired. According to Valencia, A.C. said that the Union was no good and was costing Respondent a lot of money. Next, A.C. said he did not know why the employees wanted the Union and that Respondent would give the employees paid vacation and Kaiser (health benefits).[4] A.C. said that he did not want to pressure the employees but they could sign a petition to "deunionize" the hotel. A.C. told the employees to have lunch and that they could come back later and sign "the paper." Valencia and Maldonado did not return after lunch and did not sign an antiunion petition. Valencia further testified that later that afternoon, Vargas asked whether she was going to sign the "the paper." Vargas asked why the employees didn't want to "deunionize."

Maldonado did not testify. The General Counsel contends that he made every effort to find Maldonado but was unable to do so. The General Counsel offered a pretrial affidavit from Maldonado in lieu of testimony. While I received the affidavit in evidence, I do not rely on it. In my view, without further direct and cross-examination of Maldonado, the affidavit is not reliable. A.C. and Vargas deny that they did anything more than read to the employees their union dues obligations. I credit Valencia's testimony over the denials of A.C. and Vargas.[5]

Margarita Taloma, housekeeper, testified that in late August, Leah Aquino, assistant manager, asked her to sign an antiunion petition. Aquino stated that Taloma's situation might not be as good if the hotel remained unionized. Aquino stated that the Union might only let Taloma work part time. Aquino said she could only help Taloma if Taloma signed the petition. In early September, Aquino asked Taloma to sign a petition. Shortly thereafter, Parwander Kaur, a front-desk employee,[6] asked Taloma to sign a petition stating that the employees no longer wished to be represented by the Union. Taloma did not sign. After work, Aquino went to Taloma's home and asked her to sign the petition. Taloma did not sign.[7]

[2] The five employees were Yolanda Gies, Maria Maldonada, Christina Velencia, Daisy Arana, and Mei-Yun Wu.

[3] While Valencia testified that this meeting took place on September 5, I find that meeting took place on August 31.

[4] At that point in time, the employees were not receiving health benefits because Respondent was in arrears in making trust fund contributions. After Respondent withdrew recognition from the Union, it provided the employees with health benefits.

[5] I found that A.C.'s testimony regarding the layoffs/discharges of Maldanado and Valencia was shifting and evasive. I, therefore, found A.C. to be an unreliable witness.

[6] The front-desk employees are not in the bargaining unit. These employees were formerly represented by another labor organization but are currently not represented by any labor union.

[7] I found Aquino to be an unreliable witness. Her testimony was contradicted by credible witnesses. Further, her credibility was damaged by her participation in backdating two documents.

On or about September 6, Consuelo Contreras, who inspected the work of the housekeepers and was on the Union's negotiating committee, spoke with housekeeper Xian Tan about the Union. Contreras urged Tan not to sign the antiunion petition and spoke in favor of union representation. Later that day, A.C. and Eric Yokeno (one of Respondent's owners), asked Contreras why she was telling employees not to sign the petition and that she could be fired for doing so on work time.[8] A.C. and Yokeno questioned Contreras as to whether she was unfairly scheduling the housekeepers. There was an allegation that Contreras was favoring Hispanic employees over Asian employees. Contreras denied such favoritism and stated that if A.C. was unhappy with her scheduling he could do it himself. Thereafter, Contreras ceased doing the scheduling of housekeepers and A.C. did the scheduling himself.

On September 7, A.C. met again with Valencia and Maldonado. With Contreras acting as interpreter A.C. terminated Valencia and Maldonado. Valencia asked why two employees, Gies and WU, who were hired after her were being retained. A.C. answered that there was no seniority.[9]

The final negotiation meeting between the Union and Respondent took place on September 7. The parties exchanged bargaining proposals. Although Jordan indicated that he did not believe further negotiations would be fruitful, based on Respondent's financial difficulties, he agreed to another bargaining session. No further bargaining occurred. On September 14, Jordan wrote Young stating that Respondent was withdrawing recognition based on employee petitions stating that a majority of the employees no longer wished to be represented by the Union.[10]

On October 4, employee Luz Verdin went to Aquino's office to inquire about her vacation request. Verdin had submitted a vacation request to Contreras in August and that request had been forwarded to Aquino. However, Verdin had not received approval for her vacation. Verdin asked that Aquino approve her vacation request and Aquino asked that Verdin sign the petition to remove the Union. Aquino told Verdin that most of the employees had already signed the petition. Aquino said they would make a deal; Verdin would sign the petition and Aquino would sign Verdin's request. Verdin then signed a petition stating that the employees no longer wished to be represented by the Union.[11] Aquino approved the vacation request but dated it September 14.

III. RESPONDENT'S DEFENSES

Respondent produced business records which show that as summer vacations end and as school resumes in mid-August, the business of the hotel slows down. The occupancy rate falls after mid-August. In 2005, just as in the prior year, Respondent had reason to layoff housekeeping employees. I find that Respondent had a legitimate business reason to layoff housekeepers in September 2005. The issue is whether employees Maldonado and Valencia were chosen for layoff for unlawful reasons.

A.C. testified that he called Contreras, the inspectress,[12] into a meeting with Aquino present, to determine which housekeepers to terminate. According to A.C. and Aquino, A.C. told Contreras that the hotel was heading into the slow season and that he had to let two housekeepers go. A.C. then asked Contreras which two housekeepers she would recommend for termination based on performance. Contreras then named Maldonado and Valencia, both probationary employees. Maldonado and Valencia were terminated the next day. Contreras denied that A.C. ever asked her opinion as to who should be laid off. Further, Contreras testified that Valencia and Maldonado performed well.

A.C. admitted that in the past he had laid off employees in the slow season rather than terminate employees. Further, employees were recalled when business picked up. He attempted to explain the difference here by stating that the employees involved were all probationary employees. However, the contract provision regarding layoffs states:

> In the event of layoffs due to a reduction in force, probationary employees within the affected classification(s) within departments will be the first to be laid off. Employees will be laid off from and recalled to their regular job classifications within departments in accordance with their seniority providing they have the qualifications to perform satisfactorily the work available in their regular job classification.

According to A.C., from September 16 to 24, Respondent had an unexpected increase in the occupancy rate due to a business meeting in San Francisco. A shortage of available rooms in San Francisco resulted in an unexpected demand for rooms at Respondent's hotel. Rather than recall Maldonado and Valencia for this time period, Respondent paid overtime to its housekeepers. Although recalling Maldonado and Valencia would have been consistent with past practice, A.C. testified that he could not recall these two employees because they had been terminated for poor performance.

Respondent contends that the employees began discussing the Union and whether to remain Union without assistance from Respondent. Parwinder Kaur, a nonunit front-desk employee testified that she helped housekeeper Sadot Jiminez write a petition stating that the employees no longer wished to be represented by the Union. Sadot was the only employee who signed that petition.[13] Kaur also testified that employee Ermelina Mariazeta had also expressed a desire to be nonunion. Mariazeta worked part time at the front desk and part time as a housekeeper. Mariazeta started a decertification petition on September 3, 2005. Mariazeta testified that she left the petition for other employees to sign. Eleven employees signed

[8] A.C. admitted that Respondent had no rule against discussing such matters at work and that Contreras had not violated any valid no-solicitation rule.

[9] The contract does require that layoffs be based on seniority. However, Respondent contends that the employees at issue herein were all probationary employees and therefore, seniority does not apply.

[10] The Union filed the instant charge on October 14.

[11] Although signed on October 4, the petition signed by Verdin bears the date of September 14.

[12] Contreras inspected the hotel rooms after the housekeepers cleaned the rooms. She would be the employee most familiar with the quality of work of the housekeepers.

[13] Sadot signed two petitions.

the petition after Mariazeta. Another petition was signed by employee Juan Reyes. Finally, the petition signed by Verdin on October 4 was dated September 14. The parties stipulated that the 12 employees that signed petitions prior to September 14 would represent a majority of the bargaining unit employees. There is no evidence that Kaur, Sadot, or Mariazeta were acting on behalf of Respondent in assisting with the non-union petitions.

IV. CONCLUSIONS

A. The Independent 8(a)(1) Allegations

As mentioned above, housekeeper Margarita Taloma testified that in late August, Leah Aquino, assistant manager, asked her to sign an antiunion petition. Aquino stated that Taloma's situation might not be as good if the hotel remained unionized. Aquino stated that the Union might only let Taloma work part time. Aquino said she could only help Taloma if Taloma signed the petition. In early September, Aquino went to Taloma's home and asked her to sign the petition. Taloma did not sign.

I find that Aquino threatened that Taloma's hours would be reduced if the hotel remained unionized. See *El Rancho Market*, 235 NLRB 468 (1978). At the same time Aquino accentuated the positive of signing the petition and becoming nonunion by stating that she could help Taloma if Taloma signed the antiunion petition. I find by this conduct Respondent unlawfully solicited Taloma to sign the antiunion petition. See *Fabric Warehouse*, 294 NLRB 189 (1989); *Architectual Woodwork Corp.*, 280 NLRB 930 (1986).

On or about September 6, after Contreras urged Tan not to sign the antiunion petition and spoke in favor of union representation, A.C. and Yokeno asked Contreras why she was telling employees not to sign the petition and that she could be fired for doing so on work time. A.C. admitted that there was no rule at the hotel prohibiting Contreras from engaging in such conduct. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act.

As shown above, on October 4, Aquino conditioned approval of Verdin's vacation request upon Verdin signing the nonunion petition. Aquino said they would make a deal, Verdin would sign the petition and Aquino would sign Verdin's request. Verdin then signed a petition stating that the employees no longer wished to be represented by the Union. I find by this conduct Respondent unlawfully threatened to withhold Verdin's vacation and unlawfully solicited Verdin to sign the antiunion petition. See *Fabric Warehouse*, 294 NLRB 189 (1989); *Architectual Woodwork Corp.*, 280 NLRB 930 (1986).

After the Union demanded that the new housekeepers meet their union security obligations, A.C. and Vargas met with Maldonado and Valencia on or about August 31. A.C. lawfully told the employees that the Union demanded that they meet their union security obligations by September 26. However, A.C. went on to tell the employees that the Union was no good and that the Union was costing the hotel money. The employees were promised health care benefits and A.C. suggested that the employees sign a petition to deunionize. Again, I find that by promising benefits, Respondent unlawfully solicited employees to sign the antiunion petition.

B. The Terminations of Valencia and Maldonado

In cases involving dual motivation, the Board employs the test set forth in *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983). Initially, the General Counsel must establish by a preponderance of the credible evidence that antiunion sentiment was a "motivating factor" for the discipline or discharge. This means that the General Counsel must prove that the employee was engaged in protected activity, that the employer knew the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. *Wright Line*, supra, 251 NLRB at 1090. Unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity. *Robert Orr/Sysco Food Services,* 343 NLRB 1183, 1184 (2004). Alternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Robert Orr/Sysco Food Services,* supra.

To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Embassy Vacation Resorts,* 340 NLRB 846, 848 (2003).

When the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. If Respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. *Merrilat Industries,* 307 NLRB 1301, 1303 (1992). Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line,* supra, 251 NLRB at 1088 fn. 11.

As the hotel's busy season came to an end, A.C. decided to let two employees go. He never adequately explained why he decided to discharge rather than layoff the two employees. In the prior year, he had laid off housekeepers and recalled housekeepers as needed. As stated earlier, I find the drop in the occupancy rate was a legitimate justification to layoff two employees. The issue is whether Maldonado and Valencia were selected for termination because of union activity. The General Counsel contends that they were selected for termination because they did not sign the petition to "deunionize." Respondent contends that they were selected for termination because they were probationary employees whom Contreras had designated as least qualified.

At the time of the terminations at issue, Respondent had five probationary housekeepers, Gies, Arana, Wu, Maldonado, and Valencia. Maldonado and Valencia were senior to Gies and

Wu. Gies and Wu signed Mariazeta's petition stating they no longer wished to be represented by the Union. Most important, Contreras denied that she selected Maldonado and Valencia for termination. Contreras also denied telling A.C. that Maldonado and Valencia had performance problems. As stated above, I find Contreras to be a more credible witness than both A.C. and Aquino.

The General Counsel has shown that Maldonado and Valencia engaged in protected activity by not signing the petitions as requested by their employer. Maldanado and Valencia never returned to A.C. to sign a petition. Vargas knew that they had not signed. Prior to their discharges, 12 employees had signed Mariazeta's petition but Maldanado and Valencia had not signed the petition. While there is no direct evidence that the Respondent had knowledge of Maldonado's and Valencia's failure to sign the petition, I conclude that the General Counsel's prima facie case, supported by circumstantial evidence, is sufficient to establish a reasonable inference of such knowledge. See *Abbey's Transportation Services*, 284 NLRB 698, 700–701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988); *BMD Sportswear Corp.*, 283 NLRB 142, 143 (1987), enfd. 847 F.2d 835 (2d Cir. 1988).

Respondent's animus against the Union is established by its unlawful efforts in support of the antiunion petitions. Further, Respondent did not follow its past practice of using seniority in selecting employees for layoff. Respondent did not follow its policy of recalling these employees when it needed them in only 9 days after the layoffs. Finally, Respondent's stated reason for the selection of these employees has been discredited. See *Goodyear Tire & Rubber Co.*, 312 NLRB 674 (1993).

Under these circumstances, I find that the General Counsel has established a strong prima facie case that Valencia and Maldonado were selected for termination because of their protected activities in not joining in the effort to "deunionize" the hotel.

Thus, the burden shifts to Respondent to establish that the same action would have taken place in the absence of the employee's union activities. Where, as here, the General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991). An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Betrand Dupont, Inc.*, 271 NLRB 443 (1984). As stated earlier, business considerations required layoffs, but Respondent must persuade that Maldanado and Valencia would have been selected for layoff absent their protected activities. In the instant case, my finding that Respondent's defense is a pretext necessarily leaves intact the strong prima facie case established by the General Counsel. *Limestone Apparel Corp.*, 255 NLRB 722 (1981); *California Gas Transport*, 347 NLRB No. 118 (2006).

C. Withdrawal of Recognition

The parties agree that the following section of the collective-bargaining agreement was in effect:

> This Agreement shall be in effect for the period commencing December 5, 1999 and continuing to and including November 30, 2003. At least (90) days prior to November 30, 2003 either party may serve notice upon the other by Certified Mail, of a desire to terminate, change or modify this Agreement, or any part thereof. In the event no such notice is given, this Agreement shall be renewed from year to year after the expiration date hereof, subject to written notice of termination or modification ninety (90) days prior to any subsequent anniversary date of this Agreement. For the purpose hereof, December first (1st) of each year, commencing December 5, 1999 shall be deemed the anniversary of this Agreement. If, prior to the expiration date, following the submission of such notice, unless time is mutually extended, the parties fail to reach an Agreement, then either party shall be free to strike or lock out.
>
> Upon receipt of such notice, it is agreed by both parties that negotiations will commence within fifteen (15) days. In the event a new wage settlement is not agreed upon by November 30, 2003 this Agreement shall continue beyond the expiration date thereof for such period of time as parties are engaged in negotiating such successor Agreement.

The agreement was extended until November 30, 2004. The Union sent a reopener notice on August 3, 2004. The parties agreed to keep the status quo in place while negotiations were continuing. Respondent admitted that there was a contract "in place up until the time we withdrew recognition which would obviate the need for any further negotiations."

Under the Board's contract-bar rules, where an employer and a union have entered into a collective-bargaining agreement, the employees are precluded from selecting an alternative bargaining representative during its term. An irrebuttable presumption of continuing majority status is applied during that period. To assure employees a free choice of representative at reasonable intervals, the Board has held that a contract having a fixed term of more than 3 years operates as a bar for as much of its term as does not exceed 3 years. *General Cable Corp.,* 139 NLRB 1123 (1962). A significant exception is made where the party challenging the contract is either the employer or the contracting union. In those cases, the contract continues as a bar for its entire term. *Montgomery Ward & Co*., 137 NLRB 346, 348–349 (1962). The Board stated that the contract-bar rules should not be interpreted so as to permit the contracting parties to take advantage of whatever benefits may accrue from the contract "with the knowledge that they have an option to avoid their contractual obligations and commitments through the device of a petition to the Board for an election." Id. *St. Elizabeth's Manor*, 329 NLRB 341 fn. 10 (1999), overruled on other grounds by *MV Transportation*, 337 NLRB 770 (2002). While the collective-bargaining agreement could not act as a bar to an employee decertification petition, the Employer, as a party to the contract, could not challenge the Union's majority status. Thus, I find that Respondent unlawfully withdrew recognition from the Union at a time when it could not challenge the Union's majority status. Further, as seen below, I find that Respondent could not rely upon the employee petitions to with-

draw recognition from the Union.

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board stated that an employer may rebut the presumption of an incumbent union's majority status only on a showing of actual loss of majority. The Board stated at 723:

> The presumption of continuing majority status essentially serves two important functions of Federal labor policy. First, it promotes continuity in bargaining relationships. . . . The resulting industrial stability remains a primary objective of the Wagner Act, and to an even greater extent, the Taft-Hartley Act. Second, the presumption of continuing majority status protects the express statutory right of employees to designate a collective-bargaining representative of their own choosing, and to prevent an employer from impairing that right without some objective evidence that the representative the employees have designated no longer enjoys majority support.

The Board then held that an employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit. Id at 725. The Board noted that the *Levitz* principles are limited to cases where there have been no unfair labor practices committed that tend to undermine employees' support for unions. The Board stated that it would continue to use its well-established policy that employers may not withdraw recognition in a context of serious unremedied unfair labor practices tending to cause employees to become disaffected from the union. See, e.g., *Williams Enterprises*, 312 NLRB 937, 939–940 (1993), enfd. 50 F.3d 1280 fn. 1 (4th Cir. 1995).

In cases involving unfair labor practices other than a general refusal to bargain, the Board has identified several factors as relevant to determining whether a causal relationship exists between unremedied unfair labor practices and the subsequent expression of employee disaffection with an incumbent union. These factors include:

> (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Williams Enterprises*, supra, citing *Master Slack Corp.*, 271 NLRB 78, 84 (1984). See also *Olson Bodies*, 206 NLRB 779 (1973).

In this case, there are multiple unfair labor practices; including two unlawful discharges which took place, just prior to the withdrawal of recognition. Threats and promises were used in an attempt to obtain employee support of the antiunion petitions. These unfair labor practices were designed to, and had the effect of causing employee dissatisfaction with the Union. An employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the union. *Olson Bodies*, 206 NLRB 779, 780 (1973). As one court has stated, a "company may not avoid the duty to bargain by a loss of majority status caused by its own unfair labor practices." *NLRB v. Williams Enterprises*, 50 F.3d 1280, 1288 (4th Cir. 1995). Thus, even if Respondent could have withdrawn recognition while it was operating under an agreement to keep the contract in effect, the petitions upon which Respondent withdrew recognition were tainted by Respondent's unfair labor practices. I find that Respondent cannot rely on an expression of disaffection by its employees which is attributable to its own unfair labor practices directed at undermining support for the union. Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act when it withdrew recognition from the Union.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By threatening employees with loss of benefits or promising employees benefits in order to obtain support for an antiunion petition, Respondent violated Section 8(a)(1) of the Act.
4. By discharging employees Maria Maldonado and Christina Valencia, in order to discourage union activities and union membership, Respondent violated Section 8(a)(3) and (1) of the Act.
5. By withdrawing recognition from and refusing to bargain with the Union, Respondent violated Section 8(a)(5) and (1) of the Act.
6. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged Maria Maldonado and Christina Valencia, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent must also be required to expunge any and all references to its unlawful discharges of Maldonado and Valencia, from its files and notify Maldonado and Valencia in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against them in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

The General Counsel seeks the extraordinary remedy of attorney's fees for Respondent's defense of the withdrawal of recognition allegations. Under the current standard as articulated in *Heck's*, 215 NLRB 765 (1974).[14] The Board will order reimbursement of a charging party's litigation expenses only

[14] See also *Tiidee Products*, 194 NLRB 1234 (1972).

where the defenses raised by the respondent are "frivolous" rather than "debatable." Here, I do not find that Respondent's defenses were frivolous or asserted in bad faith.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[15]

ORDER

Respondent, SFO Good Nite Inn, LLC, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of benefits or promising benefits, in order to discourage union membership or activities.

(b) Discharging employees or laying off employees, in order to discourage union activities and union membership.

(c) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of Respondent's employees in the unit described below.

(d) Refusing to meet and bargain with the Union as the exclusive collective-bargaining representative of Respondent's employees in the appropriate bargaining unit with respect to rates of pay, hours of employment, and other terms and conditions of employment including contributions to health insurance, union security, and wages.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate bargaining unit described below with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> All employees covered by the collective-bargaining agreement between Respondent and the Union which was effective by its terms until November 30, 2004.

(b) Within 14 days from the date of this Order, offer Maria Maldonado and Christina Valencia full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed but for their unlawful discharges.

(c) Make Maldonado and Valencia whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Maldonado and Valencia, and within 3 days thereafter notify them in writing that this has been done and that the discipline will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in South San Francisco, California, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2005.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 28, 2006

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with loss of benefits or promise benefits in order to discourage union membership or activities.

WE WILL NOT discharge employees or layoff employees, in

[15] All motions inconsistent with this recommended Order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

order to discourage union activities and union membership.

WE WILL NOT withdraw recognition from Unite Here! Local 2 as the exclusive collective-bargaining representative of our employees in the unit described below.

WE WILL NOT refuse to meet and bargain with the Union as the exclusive collective-bargaining representative of our employees in the appropriate bargaining unit with respect to rates of pay, hours of employment, and other terms and conditions of employment including contributions to health insurance, union security, and wages.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Maria Maldonado and Christina Valencia full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed but for their unlawful discharges.

WE WILL make Maria Maldonado and Christina Valencia whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL remove from our files any reference to the unlawful discharge of Maldonado and Valencia and WE WILL NOT make reference to the permanently removed materials in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker and we will not use the permanently removed material against these employees.

WE WILL upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate bargaining unit described below with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> All employees covered by the collective-bargaining agreement between Respondent and the Union which was effective by its terms until November 30, 2004.

SFO GOOD-NITE INN, LLC